trunk lines from outside the state has become mingled with the property within the state so as to be no longer a part of interstate commerce. *West Va. & Maryland Gas Co.* v. *Towers*, 134 Md. 137, 106 Atl. 265; *State* v. *Flannelly*, 96 Kan. 372, 152 Pac. 22.

TORTS — LIABILITY OF OCCUPIER OF PREMISES — ATTRACTIVE NUISANCE. — On the defendant's land in the outskirts of a city of 8,000 inhabitants was an abandoned cellar. A pool of water, clear in appearance but dangerously poisoned with sulphuric acid to the knowledge of the defendant, collected therein. Two children, aged 8 and 11, came upon the land, and were *then* attracted to the pool; they swam in it and died of poisoning. The cellar and pool were 100 feet from the highway, and there were paths across the land. No evidence was offered that children were accustomed to go to the place or that the sight of the pool had induced the deceased children to enter the land. It was doubtful whether the pool was visible from any point where the children lawfully were. The parents of the children brought action against the defendant and from a verdict and judgment in their favor the defendant sought review by writ of *certiorari*. *Held*, that the judgment be reversed. *United Zinc & Chemical Co.* v. *Britt*, 42 Sup. Ct. Rep. 299.

The federal rule in force since 1873 applied to "attractive nuisance" cases a standard of the foreseeability of the child's presence and injury; the child's technical situation as a trespasser was immaterial. *Railroad Co.* v. *Stout*, 17 Wall. (U. S.) 657. The Court in the *Britt* case disclaims any intention to overrule this decision; but it is submitted that the later decision appreciably modifies the earlier. Under the *Britt* case mechanically delimited categories of trespassers, invitees, and licensees are erected from the fictions of implied license and implied invitation; those in the category of trespassers are held to be owed no duty of care; the foreseeability of the child's presence through other causes than a fictional license or invitation is immaterial. This substitution of rigidity for flexibility in a branch of the law where flexibility to meet the varied circumstances of human experience is a prime requisite seems a retrogression in the humanization of the law of torts. See 35 HARV. L. REV. 68. But see Jeremiah Smith, "Liability of Landowner to Children Entering without Permission," 11 HARV. L. REV. 349; 12 *ibid.* 206.

TORTS — NEGLIGENCE — EXISTENCE OF DUTY NOT ARISING OUT OF CONTRACT — NEGLIGENT MISREPRESENTATION. — The defendant, a public weigher, was ordered and paid by the vendor to weigh goods sold. The defendant knew that the purpose of the weighing was to determine the amount that the plaintiff, the purchaser, should pay. The defendant was negligent in the weighing, and the plaintiff, acting on the defendant's certificate of weight, overpaid the vendor. The plaintiff sues in tort for negligence. *Held*, that judgment be entered for the plaintiff. *Glanzer* v. *Shepard*, 135 N. E. 275 (N. Y.).

The maker of an article which, if defective, would be reasonably certain to place life or limb in peril, is liable to a purchaser of such article, irrespective of contract, for injuries caused by the maker's negligence. *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. See 29 HARV. L. REV. 866. The same liability exists for damage to property. *Quackenbush* v. *Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. Supp. 131. And, likewise, for loss of reputation and profits. *Mazetti* v. *Armour & Co.*, 75 Wash. 622, 135 Pac. 633. *Contra*, *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288. The principle of law should be the same where the action of the defendant is directed toward another's

governance of conduct as where it is directed toward that other's person or property. The result attained in the present case is, therefore, entirely satisfactory. But the court draws a very fine and highly technical distinction between this case and one of negligent misrepresentation, thereby avoiding serious obstacles in the path of a recovery. *Cf. Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. See 7 HARV. L. REV. 124. Emphasis is placed on the negligent performance of a physical service or act as the basis of liability. But recovery should not be denied simply because this physical act is missing and there is substituted a mental service or act negligently performed which similarly finds its culmination in the words of a certificate or prospectus. *Cf. Reno* v. *Bull*, 226 N. Y. 546, 124 N. E. 144. See 14 HARV. L. REV. 66. If, in the future, the cause of action in the latter case is based on the negligence of the defendant and not on deceit, it seems that the plaintiff should recover on the principles of the present case.

UNFAIR COMPETITION — MEASURE OF DAMAGES — GOODWILL IN TITLE OF PLAY. — The plaintiff translated and copyrighted Benavente's play, "La Malquerida" (The Ill-beloved), gave it the title, "The Passion Flower," and contracted with the defendant H for production of the play on a royalty basis. Meanwhile, Benavente sold his motion-picture rights to G. After the plaintiff's play was an established success, H bought these rights from G for $2,000 and sold them under the plaintiff's title, "The Passion Flower," to S for $25,000. Under this title the moving pictures were produced in competition with the plaintiff's play and without his consent. The plaintiff seeks to enjoin production of the moving pictures and asks for damages. *Held*, that production under the plaintiff's title be enjoined and that the plaintiff have an accounting of the profits of H and S and recover damages. *Underhill* v. *Schenck*, 193 N. Y. Supp. 745 (App. Div.).

Unfair competition is often treated as a tort for which the plaintiff should be compensated. See *Sharpless* v. *Lawrence*, 213 Fed. 423, 426 (3rd. Circ.); *Prest-O-Lite Co.* v. *Bournonville*, 260 Fed. 442, 443, 444 (D. N. J.); *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. 369, 376 (6th Circ.). The defendants' profits are so far in excess of the plaintiff's loss here that on such a theory the case would be wrong. It is, however, fundamental that one is liable for any proceeds obtained by the wrongful use of another's property. *Newton* v. *Porter*, 69 N. Y. 133. It is on this basis that equity, when enjoining the infringement of patents or trade-marks, makes the defendant disgorge his profits. *Tilghman* v. *Proctor*, 125 U. S. 136; *Prest-O-Lite* v. *Bournonville*, *supra*; *Benkert* v. *Feder*, 34 Fed. 534. (Circ. Ct., N. D. Cal.) Goodwill is also a form of property. See ROGERS, GOOD WILL, TRADE-MARKS, AND UNFAIR TRADING, 127; NIMS, THE LAW OF UNFAIR BUSINESS COMPETITION, 1 ed., 21. The defendant in the principal case wilfully appropriated the goodwill of the plaintiff. Though the courts do not generally recognize unfair competition as an appropriation of property, they reach the same result where the wrong was wilful by imposing punitive damages on the defendant to the extent of his profits. See *Sharpless* v. *Lawrence*, *supra*; *Dickey* v. *Metro Pictures Corp.*, 164 N. Y. Supp. 788 (Sup. Ct.). See 29 HARV. L. REV. 763, 765. They then justify their result by arguing that it is impossible to determine what portion of the defendant's profits were taken from the plaintiff, and that any other rule leaves the innocent plaintiff unprotected. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 261; *Graham* v. *Plate*, 40 Cal. 593, 598. The result is unobjectionable but the reasoning is unfortunate.